ADR Panel

MR. WEITZ: Good afternoon. Thank you, Judge Crane for a wonderful keynote and for sticking within the timeframes as well. Let me quickly introduce the panel. To my far right is the Honorable Alan Scheinkman, who is a Justice of the Supreme Court, in the Ninth Judicial District. He sits in the Commercial Division there. To his immediate left is the Honorable Elizabeth Stong, who is a United States Bankruptcy judge in the Eastern District of New York. To my immediate left is Judge Crane, who you have already heard from. And to his left is Simeon Baum, who is the president of Resolve Mediation Services, Inc. And to his left is Stephen Younger, who is a partner at Patterson, Belknap, Webb and Tyler and President-elect of the New York State Bar Association, so we congratulate him on that as well.

I don't know if anyone here has read Malcolm Gladwell, THE TIPPING POINT.[1] It's a good book. I think of it on a day like today, because when thinking about where we have come in ADR in New York State, I think we have reached that tipping point, particularly in commercial cases. We have probably even passed that. In THE TIPPING POINT, Malcolm Gladwell talked about three rules of epidemics, how things become epidemic in culture. First is the power of context, which is the idea that the environment in which epidemics occur has a great impact on whether or not they tip. Next is the "stickiness factor," how sticky a message is. Third, Gladwell talked about three personality types that are to be credited with the tipping of any epidemic. Those personality types are the connectors, the mavens and the salesmen.

1. MALCOLM GLADWELL, THE TIPPING POINT (Back Bay Books 2002).

The connectors are people who link us up with the world, the people with the special gift of bringing the world together. You can get an idea to them. They know lots of other people, and they are able to get that information shared. The mavens are the information specialists or people we rely upon to connect us with new information. The mavens find the information, they get it to a connector, the connector spreads it and then, finally depending on the stickiness of the issue, they get it to a salesman. The salesmen are the persuaders. They are the charismatic people with powerful negotiation skills. Our panelists this afternoon are connectors, mavens and salesmen. And it if weren't for them, we wouldn't be at this place in ADR in New York State.

First, a brief overview of ADR in New York State. We now have ADR programs in place in the Commercial Divisions in New York County, Westchester County, Nassau County. It's up and running in Queens County, Kings County and Erie County. It's on the way in Suffolk County as well. Even where there is no ADR program, just about every Commercial Division has established an ADR procedure to make mediation available for commercial cases. There are statewide rules in place for the Commercial Division.[2] Rule 3 of those rules give justices of the Commercial Division the discretion to order parties to participate in free mediation.

In addition to the statewide rules, all of these programs operate with local court rules that balance the need for statewide uniformity with the mechanics of how these programs operate in each locale. The local rules deal with case selection and referral. How are cases going to get to mediation? Local protocols always address the qualifications and training of neutrals. Do they have to be lawyers? How much training do they get? As a result of the proliferation of programs throughout the state, the Administrative Board of the Courts, just this past year, promulgated a statewide rule that codifies a minimum standard for ADR neutrals, mediators and neutral evaluators throughout the courts.[3] Local protocols also address confidentiality. Lack-

2. N.Y.Ct.Rules §202.70(3) (McKinney's 2007) *available at* http://www.nycourts.gov/rules/trialcourts/202.shtml#70

3. N.Y.C.P.L.R. §§5529 & 9703 (McKinney's 2008) *available at* http://www.nycourts.gov/rules/chiefadmin/146_amend.pdf

ing a statute that would assure confidentiality local protocols establish ways of providing for confidentiality, including consent of the parties. There is a proposed statute called the Uniform Mediation Act,[4] as well. I think all of these programs address in one way or another, the issue of ethical standards for mediators. To Justice Crane and his advisory committee's credit, and those who practice in New York County, most of the Commercial Divisions, whether by affirmative action or not, have incorporated the standards of conduct that were enacted in New York County. It tends to be everywhere. Local protocols also address stay of proceedings, whether or not discovery and other proceedings are going to be stayed while cases are in mediation.

Selection of a neutral is another issue addressed in local protocols. Should the parties pick the mediator or should the Court assign the mediator? What about submissions? We have heard of mediation briefs, where the parties might submit an abbreviated brief. Should those briefs be confidential? Should they be required at all? What limitation should be put on them? And finally, these protocols address general administration and deadlines. If you practice in the Commercial Division, you know that there are compelling degrees of limited resources. How do cases get referred? Who enforces the deadlines? Is there communication between the judge and the mediator?

Now, the first issues I'd like the panel to address is the use of rosters. All of these programs in the Commercial Division, rely on rosters of mediators that are assembled by the court. The cases are referred to mediators on the roster. One issue to figure out is whether some cases are better suited for the roster or perhaps may be better suited to be handled by the judge. And I'm going to turn that issue over to Judge Stong, and see if she can identify some challenges or concerns with regard to the use of rosters.

JUDGE STONG: Thank you, Dan. I have to say it's a real pleasure to be part of this panel and in front of this meeting. I chaired the ADR committee several years ago, so did Dan more

4. National Conference of Commissioners on Uniform State Laws, *Uniform Mediation Act* (2001) available at http://www.mediate.com/articles/umafinal styled.cfm.

recently. And it feels like coming home to be here among so many friends in the ADR and the litigation world. I am a bankruptcy judge now, and I have had that position for a little over five years. But for 20 years before that, I was a litigator. And for the second half of those 20 years, I was involved with ADR, probably the first half of the 20 years I was too, I just didn't know it at the time. If you litigate big cases, you are probably doing your job well. You are probably thinking about the way to solve your client's problem every time you think about the case. I think the success of a court program, including rosters, is deeply grounded in the connection between the Court and the Bar, often realized at least in part through one of these committees. The Court can't do this alone, neither can the Bar. These are the mediators, and I'm guessing we are representative of all three groups here in the audience. I think there is an interdependency in the effective administration of a court-annexed ADR program between and among the Bar and the Bench, case administration, and the people who agree to serve on the rosters, without which you may have a bit of success, but you will lose an opportunity to have the kind of success these programs have had for the benefit of the court, the profession and, of course, your client. Let's talk about rosters. Rosters are the lists of mediators maintained by the courts to whom cases can be referred. In the Federal system, by and large, parties take their own mediator off the rosters. Sometimes the courts will appoint. Overwhelmingly, in the State system, the mediator is assigned to a case. That raises a bunch of issues, and I will touch on some, and others will cover others.

These rosters overwhelmingly are comprised of people who are willing to serve as volunteers. This is a pro bono enterprise. This is a big issue in the mediation world. When I was appointed to serve as a mediator in Commercial Division cases, everyone around the conference table drinking coffee was billing at a quite handsome hourly rate except me. And I said at the time, and I still say today, that that's right. It's a privilege to serve as a court-appointed mediator. But I also talked about merit in the points made by those who think that there is a need to recognize the importance of compensation in an appropriate case. And, as Judge Crane mentioned in his keynote, this may even make the parties take the process just a little more seri-

ously. I concluded regularly in my pro bono practice, alongside my paying practice, that it was at least sometimes the case that a party or their client would value your advice if that's what they were paying you for. And if they were not paying anything for it, it might be considered less valuable. Rosters have generally been [reviewed] through the state system by court personnel. Sometimes the parties can select; sometimes, rarely, the court can select. The judge may select. Generally, as I understand it, in the New York state system the mediator is going to be assigned by somebody in the court administration. The care and feeding of rosters is really important, really important. I think I've seen this from every perspective it possibly can be seen since I now oversee our roster in the Bankruptcy Court. I think people agree to serve on rosters for two reasons. They are looking for opportunity to serve, and they are looking for appreciation. First and foremost, I think they are looking for the opportunity to serve in appropriate cases, to apply their skills, to build their skill sets. Many of the people serving on these rosters may be quite experienced, but far more are probably going to be quite new in the mediation world. When we do the basic mediation training program here at the City Bar, one of the things we talk about is how to get experience. One piece of advice that we regularly give, is that if you have the appropriate background and you meet the qualifications, sign up for the pro bono court rosters. This is how you are going to get the practical experience. That is how you are going to get known as someone who is talented in this area and who has a lot to offer and how you are going to be able to build your practice as a retained mediator, in addition to an appointed pro bono mediator. So opportunity and appreciation, recognition by the court for service I think this is what people who agree to serve on these rosters are looking for.

I think courts, also, want diverse rosters. I mean, of course, diversity in all the ways we think about it, gender, ethnicity, background, but also practice setting. Mediation raises some complicated questions with respect to conflicts. For example, what happens when all of the mediators on a roster are affiliated with firms that are going to be representing the major institutions that may likely be parties or affiliated to par-

ties in the cases that are coming before the court that the roster serves.

You, of course, are going to be looking at the large firms for roster participants. They may be in the best situations to volunteer their lawyers' times. At the same time, the courts need to do everything they can do to broaden the practice setting and diversity of the lawyers participating.

Subsequent experience is very important as well. Diversity of experience, including, of course, experience with commercial law issues but not limited to commercial law is also very important.

In bankruptcy court, most of our cases are about money or lack of money in some respect or another. But I can tell you it regularly happens that I have a need for a mediator with an I.P. [intellectual property] experience skill-set or matrimonial skill-set, or you name it, whatever the legal area is. Of course, it is not to say the mediator needs to have the same skill-set that someone would need to be the lawyer in the case. That would be a subject for an entirely different panel. But there will be cases where not only the dispute resolution skill-set or mediator skill-set is required but also where it is useful that the mediator have some general knowledge about the concepts and the legal issues presented by the case. That kind of diversity, as well, I think is a very important thing on the roster.

Every time a case is before a judge, a good judge is probably thinking about opportunities for resolution. I happen to think that a good lawyer is making the same analysis all the time. You are doing the best work for your client when you have that question in the back of your mind.

The next question is when to get into mediation? Well, as early in the case as it appears that the settlement prospect is likely is the time to at least raise with the parties the prospect of referral to the panel. I put that into the context of 25 years experience in the profession, with 20 years as a litigator, knowing it was often awkward for me to be the one to say to my in-house lawyer or businessperson client or individual client, "Gosh, do you think it makes sense to consider taking this case to mediation, whether it's the court or privately?" That may not be the way you best inspire the confidence of your client as a practicing lawyer. And again another separate panel or program

would be conducted on the very interesting and often controversial question of sign of weakness. Is it a sign of weakness to propose mediation? It may not be to your adversary, it might be to your client, at least you may have that concern.

So, what does the judge do by raising the prospect of mediation as early in the case as possible? I often do this in the initial status conference. I'm lucky. I can conference my cases once every month or two. I see the lawyers; I know how the case is going. I think what the judge can do by taking the onus of raising the issue him or herself is to take that onus off the lawyer. Send the lawyer back to the client with a long report about the conference and the discovery issues and maybe the discovery deadline that was set, with the question of homework assignment that the judge imposed, saying, in words or substance, "I'm thinking about whether mediation might make sense here, I need you to think about it, I'm going to bring it up on our next conference, that next conference is going to be in four to six weeks. Take a look at our rules, take a look at our roster. When we come back I want to hear from you as to whether or not this makes sense." I think a certain number of cases settle even before that next conference date. It gives the parties permission to engage in settlement discussion.

A certain additional percentage of cases I think come back to court with a significantly different posture, having made progress. They're focusing on the documents they need; one deposition that's critical; one expert report that's got to be essential. They're moving that process along. At that stage, I'm in a much better position to assess whether they need to hear a little more from me. Do we need to have a chambers conference? Of course, with everybody together. I would never be in a position, nor I think would any judge typically be in a position to meet with one side or another.

But I create the opportunity to have the most meaningful possible conference on settlement issues or to see if it makes sense to send it to another judge for resolution, something I've done infrequently. Other judges in the court have been doing this more and more. I've done about a dozen mediations for one of the judges in our court and it's been not only a pleasure for me but a skill-set I haven't used for some time. It is also an opportunity to get cases resolved for the parties in court. So,

when is it time to send it to the roster? To a certain extent you know it when you see it. When is it time to talk about considering mediation? I would say at the first possible moment and the first possible conference interaction. My colleagues at the bench, please share with us, I would like to hear what your comments are.

JUDGE SCHEINKMAN: This panel has been an interesting experience for me. It's given me an opportunity to kind of do what they say in academia is a self-serve, what do I do, why do I do it, can I do it better? I think I've come to the conclusion that I am in the dispute resolution business. The goal of my dispute resolution business is to promote cost effective and expeditious resolution of commercial cases. Does that mean that that process works for everyone and every case? No.

It may be that state courts have been driven into ADR because of concerns about volume and caseloads and as an alternative to the latter. But even if you put those issues aside, and assume that a case isn't going to be delayed or protracted, there are cases that are amenable to alternative dispute resolution because ADR can provide a more efficient, fairer and appropriate resolution than the court system can provide.

That said, I think parties have rights. If a party doesn't want to settle, or participate in a process that will lead to settlement, they have a right not to do that. The court system is there, in effect, as the default decider.

And if someone said, "You know what, I really don't want any of this, I'm very happy to litigate in accordance with the established rules and procedures," that's okay with me. I think that they have a right to do that. Of course, I say that from a perspective of not having the caseloads that my colleagues in New York County have. Maybe if I was sitting in New York County I might look at it and say, well, that's great, but assuming that I have 400 cases and assuming that I tried three cases a term, or 52 or so a year, that would mean that if I tried every case, I'll maybe get to your case in eight years.

I also think that parties have a right to decide their own process. I was listening to the conversation this morning about electronic discovery. There's a great phrase that's used in the New York courts all the time, and I'm sure all of you heard it: "The parties are free to chart their own course." That is to say if

they want to find an alternative dispute mechanism or an arrangement that they want to follow, they're perfectly free to do that, and I shouldn't interfere with that. When I get a sense that this is what is likely to lead to an efficient, fair and expeditious resolution of the case, I do something very early on that I find is very helpful, which is I ask the parties before the preliminary conference to agree on a joint one-page statement of what the case is about. I also ask for the pleadings. Now, why did I ask for a one-page statement? Is it that I really don't want to read two pages? No. It's the homework assignment which forces the lawyers to synthesize their case. One of the things I was amazed about as a judge is that lawyers wouldn't want to talk before conferences. And now I'm kind of starting to force that. If I get the sense that they really didn't talk beforehand, I will say, come back next week.

JUDGE STONG: I require a joint pretrial order for the same purpose. At this point we're on a threshold of progress. It's a very good thing to think about.

JUDGE SCHEINKMAN: So, I asked them to do that one-page statement. And then I take the statement and I will try to see it as part of that dialogue. It won't necessarily be a direct approach about mediation. But I'll ask, you know, "Have you discussed a resolution of this case?" I try to get a sense about what's really driving the issue. Here's an example. I had a case last week. The dispute between the parties was a billing dispute. The defendant was claiming they didn't have all of the invoices that the plaintiff claimed to have sent.

I said, "All right, I can give you a discovery order; I can order you to produce documents and produce depositions. But you know what I'm going to do, come back in a couple of days with your principals, bring your records and we'll give you a room, exchange the records, talk them over, see what you dispute, see what you don't dispute." I had no part in that. All I did was bring them together and I think about half the case went away. There's still another half to the case.

I will also go to the panel. I'll say, we'll send you to the panel and if you talk fast, you can accomplish a great deal. The panel that we have in Westchester is a credit to Judge Rudolph, my senior colleague in the Commercial Division who put it together. After the four-hour free consultation you have to pay.

We call that the Westchester program. Judge Rudolph was very instrumental in putting that together. So what I think the panel provides is a good structure. If you're going to use court-required mediation, the court needs to be in a position to guarantee to the parties that there is at least a minimum level of training and experience and that minimum standards of ethics and propriety are going to be observed. We have folks on our panel in Westchester who are not lawyers. I have suggested those folks in particular types of cases; cases involving labor and employment and several other discrete fields, where it may be that a non-lawyer may be more helpful than a lawyer. We don't have the staffing you have and that other folks have. So we don't have a generalized clerk's office to do the selection. What I try to do is get counsel to agree. I tell them if you agree on somebody, here's the list, think it over, tell me who you like, you'll get that person.

Another alternative is the adverse selection: Tell me who you don't like. That's important because going in I want the parties to have a feeling that the process is at least capable of working and that they'll have confidence in a person that they've jointly selected. They won't have reason to be skeptical going in because of a bad experience or some concern, even if it's totally irrational, with somebody on the panel who they're going to arbitrarily think is not likely to be cooperative or is not likely to be productive.

I like the panel concept. I try to promote it at the beginning of the case. Even up to the day of trial we have had cases where we have considered going to mediation as an alternative. It's always offered as a possibility.

MR. YOUNGER: I want to throw out a little controversy. First, there's the question whether the program has been too successful. I look at it from the New York County perspective. I think there are some judges who are not getting involved in settlement the way they used to, because mediation has been very successful. But there are times when a judge really needs to get involved. The judge can see the tempo of the case much better than the parties can. The judge can suggest things in a much more convincing way than the parties can on their own. I know Judge Scheinkman will tell us he has plenty of time to settle cases. When Dan first got involved, we went down to

New York County and tried to convince the judges to send cases to mediation. In the early phases, it was a convincing process. Once they sent them, the judges were very happy because the cases weren't coming back. It takes both sides, the judicial side and the mediation side.

The second point I think Judge Scheinkman touched on is that the parties are always entitled to chart their own course. So, there's a two-level dynamic here. You want to think about the judge versus the panel. But even if you get sent to the panel, you can pick your own mediator and there's some benefits.

You can pick a Judge Milton Mollen who has had years and years of experience and you may say that's someone who I want for the case, not someone who, as Judge Scheinkman mentioned, people often go to these rosters to get experience or there may be a certain kind of experience that's not on the panel that you want to go outside for. You can always do that. You want to think about what style of mediator is best for you; can you get it from the panel or do you need to look outside?

MR. WEITZ: Thank you, Steve. Judge Crane, do you have any final comments on the issue of judges as opposed to mediators handling the cases?

JUDGE CRANE: Well, of course, the judge should constantly be seeking a resolution, seeking a settlement. But at the same time I think that the idea of mediation and having it as a court-annexed mediation, having it as a completely non-coercive medium ignores the reluctance of lawyers under the "Full Employment of Lawyers Act" to settle cases. That means that if you have a lawyer who's invested in furthering the litigation rather than in settling, you as a judge are going to have a tough time settling it. A mediator may indeed be more well equipped to getting around that problem than the judge would be.

Beyond that, I think that the laissez faire attitude has got to be tempered by the needs of managing the caseload. Even in Westchester, Alan, you've got to manage your caseload so you can't let the parties fumpher around for six weeks and decide who the mediator is going to be. That's why the protocols, at least in New York County, I thought they were statewide, allow appointment of a mediator by the ADR administrator — within ten days if the parties can't agree on someone else.

JUDGE SCHEINKMAN: I handle that problem differently. I stay cases. In other words, I would rather not put a time limit on mediation. Usually when I make a determination as to how long a discovery issue should prolong the discovery, I may build in some time before anything serious has to happen, before clocks really start running on discovery. My attitude is if there's mediation, mediation will take a long time, a short time, it can be continuous as far as I'm concerned. What I want to make sure doesn't happen is that there's no bump time. And the way I'm assured there's no bumpering is I will set a deadline for the completion of pretrial proceedings and I will build in some time for mediation. For example, maybe the parties want to do document discovery in advance of mediation or might want to put off depositions. So I'll accommodate that. But once I set my dates, as you said, death becomes almost the only operative out.

MR. WEITZ: In terms of using rosters, a couple of points were raised. Often a mixture of experienced mediators, as well as some new mediators, that raises some concern or challenges if you're dealing with someone who is newer to the mediation process. The need for diversity on your panels as well as practice setting. For example, there are construction cases, there are complex commercial cases and so on, and how do you address that?

Substantive experience is potentially a challenge. Steve Younger raised the issue. Perhaps if our panels are really that good, oftentimes judges won't actively get involved in settlement. They'll send it off to the roster. What I would like to do is invite Simeon Baum to shift gears a little bit. Judge Scheinkman raised the issue of pro bono mediation and Steve could talk about that. Since Simeon has the mike, if he wants to talk about rosters, or anything else for that matter, he's welcome to do it.

I wanted to add something else about Simeon I forgot to mention. He is the chair of the New York State Bar section on alternative dispute resolution.

MR. BAUM: We do now have the section on dispute resolution which in just a few months has grown from 93 committee members to over 600 members and is on the rise. And everyone here who is not yet a member of the section who has an interest

in what we're talking about today is really encouraged to join. It's no longer a tipping point. We really don't have to talk about ADR being on the rise, though it still is. Actually, it's really here and it's developing and flourishing, and so people are encouraged to join.

On the issue of pro bono versus for pay, I started mediating back in the early '90s, through the Eastern District and then the Southern District. I remember the first interview that I had to get on those panels was with Gerry Lepp, who is still there. I think Gerry was expecting to see someone with the gray and lack of hair that I currently have. He was looking for somebody with a little bit of gravitas, which I did not have. Somehow he was kind enough to put me on that panel.

So there I was a 10, 11-year lawyer, with really no formal experience as a mediator, going through I think it was just a two-day training, a very good training program they gave in the Eastern District and Southern District and that was about it. And my first mediation took three and a half hours. It did get resolved and I got a nice note from the court. In those days people used to write notes much more frequently than they do now. Everybody was surprised and happy. I was a very inexperienced mediator and I was mediating for free.

I think that when we think about rosters and we think about what it is people are doing as mediators, I do believe that the impulse in a mediator, whether it's in a court program or otherwise, is this kind of altruistic sense that maybe you can do something that's really of value, that maybe you can be, instead of as we were as litigators and against somebody, maybe you can get on everybody's side and maybe you can really accomplish something and get to participate in a fascinating process where everything matters, not just legal analysis, but also the parties' feelings, values, the context, everything. It's a wonderful process.

So there was a dignity in the role of mediator back in the early nineties that still continues. In the beginning, nobody was thinking that the mediators were going to get paid. So what instead happened was people would show a lot of gratitude. They generally treated mediators nicely and they still hadn't figured out what mediators were. So they almost treated

mediators, at times, as if they were quasi-judges, which they certainly are not.

And that was the compensation: the ability to participate; the parties' feedback; the gratification of seeing something get resolved. Now, time went on and the field developed. By the way, don't ignore the inexperienced. Don't put too much stock into the need for either substantive background about the case issues or the hefty mediator, for your case. Those green mediators are often filled with enthusiasm and can be very effective. So now, years have gone and let's take it to 2000.

You know, we've had 10 years of mediation experience. On these big cases where people are getting paid a lot, are we not also seeing the mediators getting compensated the equivalent, because they certainly bring equivalent value. There is a kind of irony. I find that now with eight hundred some odd mediations under my belt. Everybody is, you know, in the negotiation process trying hard to get their piece of whatever it is being negotiated over. Why isn't it for the mediator, too, to get a little piece?

JUDGE STONG: My own view, which is not a widely shared or popular one, is that, perhaps, part of the institutionalizing of the profession of dispute resolution mediation is to embrace the professional criterion of giving away some of your time. And I'll also say, someone in the market, frankly, as both a litigator and rarely as a mediator, one of the best ways to get known is to be appointed to a case through a court. In this way, you get to know the Bar and there are people impressed with what you can do. That is an additional kind of compensation, additional feeling good, frankly, developing your skill-set and network. You can be the best mediator in the world but no one is ever going to know it if you don't do mediation and the lawyers don't have cases.

But, the answer is, putting my mind in that same case, was that this is an investment banker fee dispute, and in fact, to a certain point in the early afternoon in that case, where one of the principals looked at me and said, "The thing I don't understand is why are you doing this? I don't get it, because you're not billing, are you?" And I thought, "Man, sometimes the door is just opened so wide you got to walk through it." And I said, "You know, I'm doing this because this process is so important

to me that I can't think of anything I would rather do today than be your mediator even though I'm not getting paid. Your hard effort and getting this resolved is all the pay I need." That case settled probably within an hour of that question, and I think, it's not to say that if mediators are being paid, cases don't get settled. Of course they do. But there's something to be said when it is annexed to a court for the value of having a certain amount in an appropriate case of pro bono mediation.

MR. YOUNGER: I agree with everything Judge Stong said. That's why I do it. There is a distribution problem, which is, as I sit down with any commercial litigator in this room, we're going to come up with a list of five really good mediators and on that list each of us will have, say, two or three in common. And people tend to go to the same people over and over. We're conservative by nature. That's why the really good ones are booked out until 2010. So when you have a list that's free, everybody's always going to go to those names that they really like.

The Eastern District, not the Bankruptcy Court but the District Court, has a good solution to that, which is, after two cases, everything's charged, and that kind of discourages people from picking these popular mediators. I had a similar experience to Judge Stong's, but with a different result. I had a case where it was a major bank on one side and a real estate developer on the other. And we were about to get to a resolution. And the developer looked at me and said, "How are you getting paid?" I said, "I do this pro bono." I guess I was not as articulate as to why I was doing it. He said, "That's outrageous. I'm no pro bono case." And he went in and got the other guy to agree to pay me a certain amount, which I didn't even participate in. But he was offended that I would be working for free for him.

MARK ALCOTT [from the audience]: I think what you're overlooking in this discussion on compensation is the difference between court-directed mediation, which is what court-annexed mediation is, and private mediation. In a court-annexed mediation, the parties are compelled to go to mediation. They don't have a choice. They are directed to go. And to me, the mediator should not be compensated, just as the judge is not compensated, the Court attaché is not compensated. That's a public service that's being provided.

In private mediation we are voluntarily jointly choosing Simeon Baum, we're choosing Steve Younger and, of course, we should compensate those mediators. But I think that distinction should be made.

MR. BAUM: So there's a public-private distinction and mandate versus non-mandate. By the way, among the things done in preparation for today was to take another look at the 2005 revised model standards of conduct that the ABA developed. It used to be the ABA Spider[5] AAA standards of conduct for mediators I think from 1994 or something like that. In 2005 they were revised.[6] One of the points they make on self-determination is that parties should have the power to withdraw from mediation. So an interesting question that we have in a court, where parties are mandated to go into mediation, is, how does that affect self-determination? I put that as raising an issue. Before we get there, getting back to the economic question, if you are being mandated, then on top of it, is it right to say not only do you have to go to this mediator, but you have to pay for it also? I think that seems to be something that bothers people.

There's one experience I would like to talk about on this point that I was in a very slow way getting to, and that is the New Jersey experience. Right now, there's a new system of commercial division and that is that we've got this four hours for free and then the mediators' fees are capped.[7] I think it was $300 an hour or something like that. There's a whole separate question of whether that fee should be whatever the mediator's rate is, we're talking about commercial litigation cases, if you're going to compensate the mediator.

The second part of it is the first four hours. New Jersey for years has had that system although they have the rate at whatever the mediator's going rate is and the Court sends out a notice and it will say, okay, we've appointed this mediator as your mediator, you've got 14 days to find somebody else if you

5. Society of Professionals for Dispute Resolution.

6. Model Standards of Conduct for Mediators, American Bar Ass'n, American Ass'n of Arbitrators, Ass'n for Conflict Resolution, Aug. 2005, www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.

7. *See* Rules Governing the Courts of the State of New Jersey, Appendix XXVI ("Guidelines for the Compensation of Mediators Serving in the Civil and Family Economic Mediation Programs"), http://www.judiciary.state.nj.us/rules/app26.pdf.

want to, but if you don't, this is your mediator.[8] Here's their rate. Go forth and mediate.

What has happened in New Jersey is that people will go in when it used to be three free hours and whenever the bell-ringing hour was, all of a sudden, somebody's got to bring his aunt to the hospital. Somebody's got to go, they didn't realize, but they have a deposition in the afternoon. People would behave in ways that showed that that free period had conditioned them into believing either if it was going to work, it should work within the free period or we don't want to have to pay. And, so, once the time starts to tick, we're out of here.

I have to say over the last few years of watching the New Jersey process, the culture has changed. And people come in and that mythical hour rings and nobody even notices. And they keep mediating or they don't mediate, but it's more driven by the usual factors that determine whether people feel they ought to mediate.[9]

MR. WEITZ: I want to point out that the uniform rule in the Commercial Division gives the judges the discretion to order parties to mediate.[10] That part of the mediation that's mandated would be free.[11] If the parties wish to continue, then it would be voluntary, analogous to the private sector and the mediator would be paid. That's the creative solution that we came up with. The theory behind mandatory ADR in general is that you only have to mandate it for as long as it takes people to start to appreciate it and then they ask for it themselves and you don't need to mandate it anymore.

JUDGE SCHEINKMAN: I fully agree that, even in commercial cases, folks cannot be mandated to go to arbitration and pay for it, which is one of the reasons why I don't mandate that people go to mediation unless I think there's a reasonable prospect that it's going to be a success.

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8. Rule 1:40-6 (b), N.J. Complementary Dispute Resolution Programs http://www.judiciary.state.nj.us/rules/r1-40.htm.

9. *See*, *e.g.*, Rule 3, Rules of the Alternative Dispute Resolution Program for the Commercial Division, Supreme Court, New York County (effective June 15, 2008).

10. *See*, *e.g.*, Rule 3, Rules of the Alternative Dispute Resolution Program for the Commercial Division, Supreme Court, New York County (Effective June, 15, 2008).

11. *See id,* Rule 5.

Part of it is, parties and their lawyers have a right not to be abused by being forced to go through a process that they really have a professional objection to.

The other part of it is that the mediator has a right to be protected, as well. I can remember as a lawyer being assigned a pro bono case. The person who I had to represent, made a $2,000 down payment to a lawyer on account of a $5,000 fee. And when she couldn't come up with the rest of the money, she applied for assistance; I got assigned to handle the matter pro bono.

I had this sinking feeling that I was at the wrong end of this deal. Here was this woman who is now getting a $5,000 lawyer for a $2,000 fee and there was a lawyer out there who, as best I could tell, had gotten a fee for doing nothing at all. And I was buying into an open-ended commitment which I was more than happy to undertake, but it just kind of looked odd.

I view the four-hour provision as sort of an opt out to protect the mediator from being unduly abused. The problem that you could have is if people want to sit and talk and it's going to take more than four hours, then the mediator might feel constrained to keep the process going and it gives the mediator an out to say, "Listen, I'm more than happy to continue this conversation, but now I have the right to charge you." However, I've not yet heard anybody complain that the mediator was there with a stopwatch or that they were really counting the minutes in any sort of literal way. I think it's really a protection for the mediator against the mediator being abused.

By the way, I don't read the rule, and I've never read it, as requiring people to go to four hours, for four hours. But it wouldn't shock me to find out that there were some mediations that did not last four hours and that there were mediations that lasted more than four hours for which the mediator did not ask for compensation.

MR. WEITZ: That issue of the four hours, actually I should distinguish, that the ability to order as part of the uniform rule the four hours is part of a local practice and, in fact, could vary from one Commercial Division part to the other. Because it's a local court rule, there's even more flexibility. If a judge wishes not to force people into staying for four hours and everyone's in

agreement, I'm sure that flexibility is there. Steve, why pro bono mediators for commercial cases?

MR. YOUNGER: I hate to disagree with the 109th President of the New York State Bar. I think he has a fair point about public versus private. I think the real question is what's the best call for the community. When this first came about, there was not a culture of mediation in New York. If we imposed payment, people would have gone out the door kicking and screaming. "Not only are they ordering me to mediation, but they want me to pay for it too?" Now it's become more part of our culture.

I would like to bring up California, Texas and Florida where mediation is required in order to get on to your trial calendars. It's now a part of the regular parlance of lawyers. And it's always paid for. And that's just because it's part of their culture. That's what they do. Are there ways to get out of it? Yes, there are. But, I think if you put that in New York right now, we wouldn't be ready for it. Maybe five or 10 years from now we would be.

MR. WEITZ: Let me ask a follow-up question, Steve. I want to move to the issue of rosters for a second. While we identified a number of issues, one that I think might have been referenced, but I want to raise here is the distribution of cases on a roster. So whether the Court first assigns or the parties pick, the Court might assign five days to agree on someone else. Sometimes judges may get creative and say if you can't agree on someone, give me a list of three and so forth. But the bottom line is in our preparation talks for this panel, some of our panelists had coined the phrase the "rock star phenomenon," that you have a roster but it seems like the parties pick the same one, two, three or four people all the time so the newer mediators don't get a chance to mediate.

Do you see that, Steve?

MR. YOUNGER: It happens all the time. It's the law of the marketplace. Lawyers are by nature conservative. If we have a tough spot, we want to pick the person who will make us look the best in front of our clients. We don't want to take the risk of picking someone we don't know and that's the real problem with diversity. I'm a big fan of diversity, but it's very hard for people to get their first chances. It happens whether

you're on a court roster or in a private setting. So I think the best way to move out of that is when you have situations where mediators are just booked up and you can't get them so you're going to pick somebody else and try somebody new.

The Court could change it by saying after one or two referrals in a year you're taken off the list and you're not given an assignment. You can do it that way.

JUDGE STONG: I'll say this, as the author of the "rock star" phrase. It's an issue and a real challenge for courts and for lawyers, you know. When I was in practice and my colleagues in the litigation department, we had a question about a case that had either been referred to or thought might be perfect for mediation, I got a lot of calls and e-mails about who do you think is appropriate. The tendency is to think of people you know.

When you want to hire local counsel in Chicago, do you get out the phone book? Of course not. You try to get a reference based on personal experience. As a judge looking at our panel in the situation where I am going to suggest people or even appoint someone either for pay or pro bono, can I entirely exclude from my mind the fact that I know that the last few cases that went to this mediator got settled and the cases that went to that mediator, either I have no knowledge of that person or I hear things like, "He met with us for an hour and said it was impossible, the case couldn't be settled." That's heart breaking if you're a person who believes in this process and thinks of it as a useful adjunct to case administration.

So I think we need to come up with as creative ways as possible to get to know each other, frankly. Mediators need to embrace the opportunity presented by programs and, yes, pro bono opportunities, large and small, to become one of the people that people know.

You need to be a little bit known. It's not so different than trying to get hired as a lawyer. It's a challenge for the court programs and it's not just about the money. Remember, care and feeding of rosters is not only about appreciation, but also experience. It's a challenge.

JUDGE SCHEINKMAN: I want to discuss the issue of the selection of the so-called rock stars. The administrator of the New York panel, the one who does the paperwork on it, calls

me a couple of times a year. Usually they are very big cases and with very sophisticated lawyers and clients. I just recently had my first one under the new system. She asked me if I would be available to take a case. I consider it pro bono when I do that even though I am now being paid a nominal fee. This was a very sophisticated case involving several million dollars. But it was not only the dollar value, but the sophistication of the issues involved. So I said sure, I'll take it.

The lawyers came in and one of the lawyers reminded me of the new rule. I said, "Certainly I'm aware of it. Four hours you get for free and the rest you're paid, I'm paid $300 an hour." Although I think there's a provision that if they select you, you get $375. Is there something to that effect? Does anybody know that?

MR. BAUM: I thought if they select you, you get paid from the start at whatever your rate is.

JUDGE SCHEINKMAN: There's something to that effect.

AUDIENCE MEMBER: As the arbitrator you get paid $375.

JUDGE SCHEINKMAN: We had two sessions of about ten hours. And the way I constructed the bill, I listed the ten hours and I said pro bono for six hours at $300 an hour. $300 an hour times six was my fee. It was a lot of work. The only point that I was kind of concerned about, one side had four lawyers and the other side had two; I guarantee you I was the poorest paid lawyer in the group. And we're aware of that. And I don't mind the ordinary run-of-the-mill hundred thousand dollar cases doing it. But sometimes when you get into that realm, where each side has carte blanche for how much they pay their lawyers, under the old system, if they would select me, they would pay my going rate. That's not true now. And I don't mind doing it and I would prefer to do it for a case where money was an object, was the principle. There was no money principle involved.

MR. WEITZ: One of the reasons why we tied the compensation issue together with the issue of rosters is because I think they do play off each other. On the one hand, we can't mandate people to pay, but we can mandate them to attend. And if they attend, they attend for a certain period of time and then they can't reject the fee. But we also want to regulate and get in-

volved in the fee. Actually there's some difference among the Commercial Divisions on their approach to this. We might see more experimentation with it, that some places do want to cap the fee and others might leave it to a market rate. I'm wondering, Judge Scheinkman, if you have a comment on the rock star phenomenon?

JUDGE SCHEINKMAN: I would rather have the parties pick in the first place. One of the reasons for that is we really don't have a separate ADR administrator as there is in New York County. So it makes me uncomfortable if at the end of the day I have to directly or indirectly do the selection. And, again, as Judge Stong stated, you tend to go with who you know or who has a success record. But I really have to make more of an effort and that's something I know I need to correct, to make sure that we pay more attention to other people on the panel.

Although I must also say that I don't keep records. So it's kind of, you know, by memory, who was the last person. We don't have an ADR clerk keeping track of who got the last one. It isn't always so easy.

MR. WEITZ: You raise an interesting challenge that, besides the principle that we talked about, there are resource questions. Without a dedicated clerk or administrator, wanting to enable the parties to pick might work even better than simply assigning because you want to separate the judge from the actual appointment of the mediator. So if you have no one to handle the assignments, you may simply leave to the parties to pick.

One interesting note is the evolution of the New York County program. What originally they did, even with an ADR clerk, they gave the opportunity to the parties and counsel to pick, and that ended up in a built-in delay in the case. The parties never got around to picking. They never got around to agreeing. So this ADR clerk's job became calling and following up with counsel to find out why they didn't send in the name of the mediator they agreed on within the set deadline. That's why the Court moved to assignment, saying, "Here's your mediator and if you want someone else, let us know within five days."

MR. GINSBERG [from the audience]: I suggest that there's an easier method of getting the underutilized mediator known,

and that's to appoint him or her as a co-mediator with the rock star. No down side. Now I have a question.

I just read the rules of the Commercial Division because I'm not on a panel, not a New York County lawyer. There is a provision in there that the mediator should examine for conflicts of interest. I always believed that there is no down side as a mediator because there must be acceptance by the parties. And where is my conflict? What do I have to look for and disclose?

MR. WEITZ: I want to thank Gene for being the perfect transition to the next question. But also let me say the issue of co-mediation or mentoring, if you will, is another topic that's always brought up. It's a wonderful way to get new mediator experience and get some feedback. It goes back to some of the other challenges we talked about, resources and so forth. So particularly in the Commercial Division that does not have the administrative support for a separate ADR program, for them to actually handle the pairing of new mediators with experienced mediators has always presented itself with a challenge.

That solution is a wonderful one. Finding the resources to implement that solution is part of the challenge. We have scheduled for our next issue a discussion of the revised standards of conduct. And we have a couple of experts on our panel including Steven and Simeon to talk about it.

MR. YOUNGER: Let me break it into two issues. One is the conflict issue that Gene just raised. I think there is a conflict issue. It's different than if I was a judge or if I was a lawyer. The same identification goes on. If you represented one of these parties or a subsidiary, somebody related to them. But it's much easier to waive a conflict in mediation than anywhere else. And that's because so many conflicts are imputed.[12] "Yes, my partner does work for Coca-Cola. I've never met anybody from Coca-Cola except to drink the soft drink." You put everything out there and the parties can decide, do they still think you are going to be fair and do they still think that you're the right person? On the other hand, if I spend every day of the week representing Johnson & Johnson, there's no way that I

12. *See generally*, Model Standards of Conduct for Mediators, http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.

could be picked as a mediator in a case involving Johnson & Johnson. It's not fair to the parties because my natural affinity is going to be towards Johnson & Johnson, or as the judge I clerked for once said, maybe I'll lean over so far backwards on the other side that I'll actually disfavor Johnson & Johnson.

But I think ultimately it's a party choice issue. They are entitled to all the information. And with the information, if they want to proceed that's fine. But if they want to pick somebody else, that's fine as well. In terms of the standards — and I want to applaud Dan in particular and O.C.A. [Office of Court Administration] in general for adopting these.[13] The [New York] State Bar in 1999 called for unified standards in New York for mediators. And it took a lot to get these passed. These are minimum standards. It doesn't mean this is what we aspire to, but this is the minimum.

First, each list is at the discretion of the District Administrative Judge. You serve at the pleasure of your own roster and you can be taken off at any time by the Administrative Judge. For mediation, first of all, silently omitted is the word "Lawyers." You have to be a lawyer for neutral evaluation. I don't believe you have to be a lawyer to be a mediator.

MR. WEITZ: Correct.

MR. YOUNGER: It doesn't say that expressly. It's just not in there. You have to have had at least 24 hours of basic training. And this is something that has been somewhat controversial. Some people say even with 48 hours or much longer training, it's not enough. But 24 hours is sort of a norm that that they came up with as a basic training. But you also have to have 16 hours of additional training in the subject area in which you're mediating.

You also need to have recent experience mediating the type of case that's being sent to you. I think it doesn't define what the subject area is, but I assume it would be commercial litigation. You don't have to show that you had a reverse repo case before.

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13. New York State Unified Court System, Division of Court Operations, Office of ADR Programs, STANDARDS OF CONDUCT FOR NEW YORK STATE COMMUNITY DISPUTE RESOLUTION CENTER MEDIATORS (October, 2005).

There's also a continuing education requirement. You have to have had at least six hours of CLE every two years. And there's a requirement that you be re-designated every two years. So there's some refreshing of the list. But this is a new standard and obviously you can have higher standards, if you want. You can have specialized standards for Family Courts, say, or specialized standards for the Commercial Division. But now there is a basic statewide minimum standard.

JUDGE AUSTIN [from the audience]: I think there has to be a full conflict search, and it isn't as easily waived as you would suggest. There is always going to be some degree of buyer's regret, and we see it all the time. I don't think that it makes a lot of sense for us to not have a full conflict search and to allow a waiver unless there is a really good allocution and certainty that there has been full disclosure. I don't think it's as easy as you suggest.

MR. YOUNGER: I think you have to have a full conflict search. I'm not saying now, but I do think you have a waiver and I will give you a reason. I mean, for example, I've done a lot of work for a particular insurance carrier that happens to be in this room. There are people who are adverse to that insurance carrier who want me as the mediator because they think that I can pick up the phone to the carrier and get them to settle the case. They think that somehow I will have more clout with that carrier. But you have to bear in mind that in mediation nobody can force anybody in the room to do anything. I don't decide the case. I just try to work through the problem. It is easier to waive a conflict in mediation than in any other situation.

On the other hand, you are absolutely right, I get them all in writing. I don't want someone to come along with buyer's remorse and say, I really didn't waive this. I put it out there in writing. If you don't get it in writing, it's worth the paper you didn't have printed.

MR. BAUM: I fully agree with what Steve just said.

At some point maybe we can get into the definition of mediation, but certainly I think the commonly accepted definition is seeing the mediator as the facilitator, with the parties being the decision-maker. A mediator is not like a judge, a jury or an arbitrator where they are making the decision. The mediator is

the facilitator. There is a little bit more leeway in that type of conflict scenario.

I want to point to two sets of rules. Right now, at least for the Commercial Division, the rule is a mediator should conduct a conflict search regularly. A mediator should decline at any point if acceptance could create a conflict of interest and should disclose the potential conflict of interest. And if discovered, they have to disclose them at the time they arise. But then there is waiver language. Our Commercial Division Rules basically say if you tell everybody about it and they are okay with it and you are okay with it, you can go forward.[14] Let me actually read that to you.

Under the Ethical Considerations for the Commercial Division set of rules, when I say the rules, I mean the ones from the year 2000 that were done in Supreme New York, it says:

> If, during a mediation, the mediator discovers a conflict, the mediator should notify the Program Administration and counsel. Unless the mediator, the parties, and the Program Administration all give their informed consent to the mediator's continuation and continuation would not cast serious doubt on the integrity of the process or the Program, the mediator should withdraw.[15]

There is a double component. One is that everybody is okay and informed and consents. And the other is that the potential conflict doesn't cast serious doubt on the integrity or process. If you move forward – and by the way, this was done in 2000 by the Commercial Division - going forward five years to the revised rules, conflict of interest standard 3B says if a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with mediation regardless of the expressed desire and agreement of the parties.[16]

So, this raises an interesting question. What do we see as the scenario where even if people say, "Okay, thumbs up. We love you. We don't care that you are employed by"— this is an

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14. http://www.nycourts.gov/courts/comdiv/ADR_ethicsformediators.shtml. Commercial Division, New York County, Ethical Standards for Mediators, Standard III (Effective March 1, 2000)

15. *Id.*

16. *See* http://www.nycourts.gov/ip/adr/Publications/Info_for_Programs/Standards_of_Conduct_CDRC_mediators.pdf New York State Unified Court System, Division of Court Operations, Standards of Conduct for New York State Community Dispute Resolution Center Mediators (Effective October 25, 2005).

extreme example –"by this party or that you work for the firm that's representing one of the parties," or any number of really extreme examples where conflict is raising not just the yellow light but the red light. There are arguments in mediation, in mediation theory, which would say I want to get the mediator that has a good relationship with the party on the other side of the table, because if I do, what's the mediator's job? It's not to make decisions. I don't have to worry about that. It's to help people do a couple of things. Talk together, communicate clearly and maybe we should talk about this separately. Think about the risks involved and the transaction cost and the reasons a settlement might make sense or not make sense. If your own party has a lousy case, the best favor the mediator could do for that party is to tell him, "Hey, you have got a lousy case. If you don't settle under the terms that we have on the table, you are going to end up in a worse situation. You are going to spend more money on legal fees, and you are probably going to end up losing your case. You are not going to get the damages that you are entitled to," whatever it is. Even if they are aligned in interest, the mediator, an effective mediator in helping the party with whom they are aligned in interest understand why they would settle, whatever the deal is. It's a very interesting, challenging problem. Those are the rules.

MR. WEITZ: I think we are finding that this topic of mediator ethics is sticky.

JUDGE STONG: Following up on Simeon's point, I used to encourage parties to think with a very open mind about the mediator proposed by their adversary, which is very, very difficult to do in a contentious litigation because there is a kind of reactive devaluation. If you want this person, then I shouldn't want this person. I think it is worth pausing and hovering for just a moment over this notion of conflict. As litigators, you get very accustomed to thinking of conflicts as being adverse to your client, or you suddenly discover that your corporate partner whom you have never met did the deal for three years ago, whatever it is, but which is, in fact, a conflict because it's imputed knowledge and affirmed. And the conflict that I guess I would be concerned about, even if that one is waived, as someone responsible for the process as the judge in the case and the

judge is responsible in our court for the program, that's not the only waiver involved.

The other issue, of course, is the counter-party. The person across the table who, or the party across the table who, part way through the mediation has it dawn on them that the mediator has a relationship, maybe not personally, maybe through his or her firm with the other side. Are they going to feel comfortable that this is truly a neutral process, a neutral, productive facilitative process? If they are very sophisticated, they may appreciate that the person can pick up the phone and get to the right person, and the client can make something happen. But more likely, when I'm thinking about a court process under the law, can the neutrality of that individual be really above reproach and not only have conflicts been waived by the mediator, but a mediator as to the client, but perhaps even more importantly, by the other side as well. I think it gets into murky water, and it is something that is sticky for a reason. It's something that I would be concerned about. No matter how good the disclosure is, I come back to, in a way, to the Hippocratic oath and first do no harm. The one thing I don't want a mediation to do in a case is leave us worse off than we were before.

MR. WEITZ: Elaine Greenberg with a question.

MS. GREENBERG [from the audience]: The process of disclosure is so critical and the way you think about it can really enhance the integrity of the process. If the mediator discloses the conflicts, the relationships with people on both sides, puts it in writing and gives the parties and their attorneys time to think about it so it's not happening at the mediation table, more often than not, the parties have greater confidence in the process because they think the court system is rigged all along. And here this is something different that people are being refreshingly transparent. And I say that's the worst fear, that to see people are disclosing conflicts. They have time to think about it and make a choice. So I think it can enhance people's confidence in the process.

MR. YOUNGER: And there is no penalty for knocking somebody. I always make that absolutely clear. I have no vested interest in staying with this case. If you want somebody else, that's fine.

MR. WEITZ: Let me take stock for a second. We have been talking about mediator ethics for the last few minutes, and we narrowed it to dealing with conflicts of interest and the principle of disclosure and transparency. And we saw how it's rather nuanced. Because, in fact, you could, on the one hand, want the mediator to be neutral and there not be any perception of impropriety, but a mediator who is well-known to the parties might actually have some value to them as long as everyone consents to it. We got there after talking about the issue of compensation. The reality of the programs here in New York is that the mediators, in general, start off doing a certain amount of pro bono mediation, usually pursuant to an order to participate in mediation. And once that order is complied with, usually defined by a certain number of hours, the parties can voluntarily agree to continue with mediation, and then the mediators are typically paid by the parties. How much the mediator is paid could vary from program to program. And there is an issue of whether the court should cap it or whether the market should rule on that. And we saw that the issue of compensation actually dovetails with the issue of the use of rosters in general.

Most of our commercial litigation programs rely on rosters. Now we know that they are all trained in accordance with minimum standards established by the courts. Some of them have more experience than others. And the panel talked about the rock star phenomenon, and we will credit Judge Stong for his phrase for it. That creates an issue of wanting the parties to be able to pick in general. And if they do pick, they are going to go to the mediator they know. And if the users of the program are not as familiar with the population of mediators up there, they are going to go back to the same three or four people. It seems to be a consensus among the panelists that they did not feel it was the responsibility of the court to force people to use mediators that they would not otherwise pick themselves just for the sake of getting the experience for those new mediators. For mediators to get their names out there, perhaps one tip that we picked up is that while we have reached the tipping point of acceptance of ADR, we thought we would have seen the floodgate open to where an overwhelming majority of cases are getting to mediation. If that were the case, I think Steve's proposal

was that the rock star [mediator] wouldn't be able to handle every case, and people would be, by forces of the market, required to try other mediators. We have identified a lot of the issues. We have raised concerns. We had some solutions that are already out there and some that we might consider. I want to move us on to a couple of other issues.

Now we can get to one of the hallmarks of mediation, and that's the issue of confidentiality. There has always been tension between confidentiality and the role of the judge as a case manager. And I'm wondering if you could address the question of what communications, if any, can be shared between a mediator and a judge who is trying the case?

MR. YOUNGER: Almost none. In my view, when I get picked, and by the way, there is one very famous mediator that totally disagrees with this and feels that because this person talks to the judge all the time that the mediator has much greater power to get a settlement. I think the problem is it does give the mediator a certain amount of the black robes that the judge wears. The problem is it takes away a great incentive for parties to be candid with you. I tell people up front I will not discuss anything that is said in the mediation with anyone, much less the judge. At the end of the case, all I will do is to report back to the judge whether the case settled or not and whether the parties came in good faith.

I have only had one situation in my whole career where I was really confronted with that. It was a situation where a party had summary judgment on liability entered against them and was referred to mediation. And when they got to mediation, they had a zero pay offer. I just viewed it to be total bad faith. They already had liability against them. There was no way the case was worth zero. And what I did was I had them think about it for a while. I said, "You know, I'm thinking of what my obligations are. I don't think you have come here in good faith. And you are putting me in a posture where I have to report this back to the court that you didn't show up in good faith." The next thing, they came up with money. So I never had to report it back. But the real difficult situation you get in as a mediator is, what is good faith?

By the way, this is incorporated in the rules. The rules have a confidentiality provision in them. Simeon will talk in a

minute about how enforceable that is in the absence of a Uniform Mediation Act.

MR. WEITZ: So we saw the interplay actually between confidentiality, which is both a legal and ethical issue for mediators and parties in mediation, and how that dovetails with the issue of potential good faith, and that's a controversial issue in itself. Judge Stong, from a judge's perspective, what are your thoughts on this issue?

JUDGE STONG: I think it's absolutely essential to the mediation process that the parties be comfortable when they speak to the mediator, or when they speak in the mediation, [that] they are speaking within the four walls of that room only, and that nothing they say will go back to the judge. I think it would be devastating to the process if the parties suspected that either because it was explicitly permitted or perhaps because there was some sort of a wink and a nod, I think that's something that really should never be part of the court process; that the information, statements, the attitude, the good faith, the seriousness or lack of seriousness with which the process is being pursued, other than simply an up or downward statement or not, whether there is an opportunity there would be communication back to the Judge, I think would be very difficult for the process.

That being said, I think the balancing act for a judge in this situation goes back to one of the first questions that Dan put to us, which is, there is a spectrum from judicial case administration, case conferencing, judicial semblance conferencing, maybe chambers conferencing with all the parties present, talking about the idea of mediation, talking about what would happen if there was mediation, referral to mediation, discussion of who might be a good mediator, all of that is certainly appropriate for discussion with the judge as part of the case-management process. It seems to me that once it goes over to the other side for referral, one might be curious, but it's not appropriate, and not something I would ever initiate or permit to hear back from the mediator. I'm not even curious about that. That's not part of my job. When I'm the judge and I refer the case— I will tell you in the cases that I've been the mediator for—in our court, there is no conversation whatsoever about anything substantively that happens in the case. Scheduling may come up. But I think

it's pretty much a bright-line distinction that needs to be maintained.

MR. WEITZ: I think an issue that the judges struggle with, is when the mediator comes back with a statement, made only after a lot of thought and with some reluctance that there has not been good faith participation. And my question for Steve is, what do you think a judge should be thinking about to do next, sanctions? That seems odd. We have 30 lashes with the wet noodles? What do you do if the parties or a party did not participate in good faith, and if so what then?

MR. YOUNGER: If I was the judge and one of the parties was reported to have been there in bad faith, definitely I would be considering sanctions because the other party wasted a lawyer's time for preparing and coming to that mediation. So there was a cost incurred by the bad faith.

MR. BAUM: Can I just interject one thing here? Just to spice it up a little bit, I'm not convinced that coming with zero in your pocket to a mediation means you are there in bad faith.

MR. YOUNGER: It's actually in Federal Court. Liability had already been entered against them.

MR. BAUM: If you think you have got a good appeal, I still believe that good faith negotiation means you come there and you act with integrity. And with integrity, you believe that you do not have to pay a dime, you should not have to pay a dime and you are willing to fight it out, then it's an act of your integrity to say "no pay."

On the other hand, part of the good faith is, at least, to not only speak but also to be willing to listen. And even that is problematic. Because if you look at the model rules from 2005, one thing they say is it's all about the freedom of parties in mediation, self determination.[17] Self determination is not just about outcome. In other words, it's not just about what deal to make. It's also about process. And isn't that an act of freedom to say, "I don't even want to listen?"

Now, we mediators, and I wager everybody in this room, would say, "Hey, you know, that's no good. We are altogether. We have a common problem. We owe it to one another to en-

17. *See* Standard I, Model Rules of Conduct for Mediators, American Arbitration Ass'n, American Bar Ass'n, Ass'n for Conflict Resolution (2005).

gage in dialogue in candor and honesty and with an open mind. Those are all values that we share." But when you push the freedom envelope, query whether you need to require somebody even to listen and to participate. And related to that, in the 2005 revised code, they say that you can't take it out— also a part of self determination— you can't take it out on one party if you don't share their values.

MR. YOUNGER: If in my case the parties had come in and said, "We think the judge is wrong, we are going to appeal and here is the legal cost. We are putting on the table the legal cost of the appeal;" basically they are saying this is a frivolous case, why should we be here?

MARCUS [from the audience]: I will try to be brief. I disagree with Stephen. I'm uncomfortable with that example. I have mediated many cases. I have never considered a party's substantive position on settlement to be good faith or bad faith. To me, the parties very often start by saying, "Not a dime to contribute," and I never let that stand in the way.

MR. YOUNGER: Suppose there had been a jury verdict entered for $16 million and they came in and offered zero, do you still agree?

MARCUS: I have had occasion, but I did once have a bad faith episode. It had to do with process not with the substantive proposal. And it had to do with this vexing question that maybe you'll discuss before we conclude of how you make sure that a corporate party is represented at the mediation table by the decision-maker. And that, therefore, the person who goes through the process—because we all understand that mediation is a process. It changes people. If properly and happily conducted, it changes their positions—and so you want that decision-maker there. And I made it very clear in the early conference calls that there had to be the decision-maker there. I was assured the individual who would show up would be [the decision-maker]. And as it turned out, it was not the decision-maker, and they had to call somebody else and so and so on. I was infuriated. The other party brought their decision-maker from Europe. And so, I did feel that was bad faith, but I didn't discuss that with the judge. I talked to Mavis Buckner about that. I thought that was a matter to discuss with the administrative staff and how to deal with it. And, you know, they gave

me good advice, and I implemented that advice and we solved the problem.

MR. WEITZ: We have the issue of good faith participation and reasonable minds seem to disagree a bit on the interpretation on that, which is why it is controversial and can be an elusive term, but it is also nuanced between substantive participation and procedural participation.

JUDGE STONG: I think the distinction between process and substance is a really helpful one. And I think Marcus puts his finger on something that could probably be dispositive of 99.5 percent of the .5 percent of cases where good faith participation is an issue. Nobody, I think, should be an advocate of the notion that you somehow are less zealous for your client when you come into mediation advocacy, but your zeal is manifested in a different way. You are no longer arguing to win. Sometimes in mediation training sessions we talk about win, win. And sometimes I think we more reflectively talk about settle, settle.

Everyone is better off although nobody wins. And if you set up a mediation under a mediator or a lawyer for one of the parties, creating an expectation of that marvelous feeling of winning, you are probably setting it up in more of a "first in 20 than a first in 10" type of a way. The process versus substance is something that I would look to. I would be very reluctant as a mediator ever to report a party as not in good faith. I think I would be equally reluctant, although I was counseled not to predict the future, to find that a party had not participated in good faith. I had many mediations as a lawyer, occasionally as a judge, where both parties arrived thinking they should be paid. I also think the point about the role of the administrator is really well taken. Under the oath, you are required to serve on court advisory panels because you are serving a court. Those of you in a position to have some influence, I imagine it was a very useful thing for a court to have an ADR administrator who is more than just a clerk who checks off boxes, but who has, as many other courts in New York State do, some awareness of the panel, knowledge of the judges and of the process, and can be that gateway to a better opportunity for the process to be successful. I think the administrators may be able to fill that role.

Who to bring into the room? I used to represent a lot of very large companies, and if you read the guidelines, you got the feeling that what I needed to do was bring in the CEO, the CFO and the chairman of the board of a large public company. And I can tell you that there would have been no better way to guarantee the failure of that mediation in some circumstances. And to make me bring that person who might ultimately have to sign off on the settlement and a large amount of money being paid to bring them and frankly test their patience through a process that they would expect someone they trusted to brief them on, to make a recommendation or a phone call that they can sign off on, than to have them there. And I would urge anyone who is in the mediator role to respect the lawyer's view, not to diminish the process by bringing an unimportant person. But hopefully, the lawyer knows their client well enough to bring the right person and be sure there is good communication before the mediation. So that if one side is bringing, in effect, a three star general, then the other is to bring in a private — I'm showing my own lack of knowledge in military rank — so that there is at least some parity or knowledge of disparity for the mediation, otherwise you may have a tough first five minutes.

JUDGE SCHEINKMAN: My comment is really a question: why are we mediating at all? In other words, I would, rather than key up the situation where it's doomed to fail, if the person takes the position that we're not going to pay, we want to appeal, that's fine; then what I would be more offended about is that if there they were forced to go to mediation and they took that position, then somebody said, "Look, sorry to be here, Steve, but we told the judge we had no pay, we still have no pay." They're actually being honest and within the construct of their environment in good faith. That's why I would not send that sort of case or circumstance where the parties' positions are so disparate. I would then say that's your right, that's your privilege.

MR. YOUNGER: I think 95 percent of the judges agree with it. And I don't know how that case got to me. I don't talk to the judges about it, but I think you're absolutely right.

MR. BAUM: The guidelines that were laid out in 2005, under standard six, "Quality of the Process," require that the mediator shall promote a mediation in a manner that promotes

diligence, timeliness, safety, presence of appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants; then it goes on to list a whole bunch of scenarios of the kinds of things a mediator would be looking to encourage to develop, create opportunities for in order to make a quality process.[18] But I'd underscore in a manner that promotes diligence and you can also add in the one about appropriate participants. Now, the standard one, they have self-determination and then they have a fairly broad view of that, meaning freedom, not only in terms of substantive decisions but also in terms of procedural decisions.

So, interesting problem, where is the dividing line? One guide is given under standard 1(a)(1), where it says although self-determination is a fundamental principle, a mediator may need to balance a party's self-determination with the duty to conduct a quality process.[19]

So there is the balance. It's self-determination and freedom and all those things, but quality process which means getting the right people to the table, having people work with diligence, having an honest, candid interchange in a fostering understanding, all of that.

If it turns out that the parties are not engaging in behavior that's consistent with the quality of the process, what's interesting for us, with the Commercial Division, is we have — this is all occurring within an umbrella that's got an element of coercion. There's a judicial mandate. And people have to participate within certain rules pursuant to an order. Now, Judge Scheinkman approaches this by not making that mandate. But assuming there is a mandate, it adds a third element to this balance between the mediator's freedom to say, "Hey, I'm not going to go forward with this anymore." That's the mediator's freedom to say, "This is no longer quality process, I'm out of here."

MR. YOUNGER: It happens all the time. And I think the key thing is in the conference call to ask both sides who do you

18. *See* Standard VI, Model Rules of Conduct for Mediators, American Arbitration Ass'n, American Bar Ass'n, Ass'n for Conflict Resolution (2005).

19. *Id.* Standard I

plan to bring and ask the other side is that okay with you. And in most cases it's been enough discovery where they kind of know who the players are and they can say, "Well, how come you're not bringing in person X or person Y?" But if it happens that the actual session itself is wasted away, in truth in the corporate world there's nobody who really has authority to sell everything, because you may have to go all the way to the board of directors. But if you're negotiating with somebody who isn't in the room, it's a recipe for disaster.

MR. WEITZ: So one of the lessons that I hear is that, as is often the case with ethical dilemmas, there are practical tips and practical solutions. Everyone ready for a quick sharp right turn. Up until now we've been talking about the use of mediation for a number of purposes but largely for the attempt at a global settlement of the case.

One of the topics we wanted to raise with you that dovetails with this morning's session is the use of mediation for parts of cases; for example, for resolution of a messy discovery dispute. I'll throw it out to anyone on the panel or even anyone out there.

So, what do we think of the use of mediation for resolving discovery disputes, either as part of a case or perhaps as part of a more global settlement. Anyone?

JUDGE STONG: As someone who is a great fan of the process, what I'm about to say may surprise you. I don't think there are many discovery disputes that can't be resolved in an effective and informed conference with the court and you get a resolution right then. I can probably count on the fingers of one hand the number of discovery motions I've seen, maybe two hands, but not a lot more than that, in five plus years. But a large number of discovery disputes come up in conferences or even on telephonic conferences.

We conference them, we resolve them. If I thought mediation would be appropriate, I would have no hesitation to start a referral to mediation with an issue like that. But for me that might actually be an example of something where if the judge has a proactive approach for case management, request a conference with the judge first.

Make a distinction between the discovery issues in general and the big issues in the case, you know, like liability and dam-

ages, and then you can approach them in a step-wise way. You may not agree about what documents to produce, but you all agree you're going to produce these core documents. Start with that, have another call in a week. It would be a very routine way for me to handle an issue like that.

Would I refer to mediation? Of course. But would it be high on my list to use up the resources of our panel and the scarcer resources of the parties' willingness to try mediation in a case where they may feel they have come to court to get a decision? I'm not sure I'd go there.

MR. BAUM: We all know there are discovery masters out there. Special masters for discovery are often very useful, for having the added oomph for the right to make a decision really is helpful. The place where mediation can really help with discovery disputes is when it gets sent to mediation, and then, in the context of the mediation, there are all kinds of ways the mediators can truncate disclosure.

What's really essential—my standard line is to say, "Okay, what, if anything, do you need to do before we get together, so when we do get together we have a fully productive session?" That opens the discussion as to what information do you really need, that is going to be an impediment if you don't have it to settle or resolve?

JUDGE STONG: I entirely agree with Simeon. That's a completely different question.

MR. BAUM: It helps move information very well. This morning during the e-discovery session, I understand somebody, while I was out — actually had to leave because I had a conference call for a mediation where I actually was working out a discovery problem, just coincidentally — someone else here was saying, "Hey, why don't we do mediation for e-discovery?" That's a whole different type of scenario. I'd be interested in what Judge Stong would think about that where you've got maybe a million dollars worth of discovery to handle.

JUDGE STONG: I would have no hesitation to do it if it made sense. I would first conference the issue with the lawyers. If they were retaining forensics experts I would encourage them to get those retentions done so they know what advice they are getting. I've had very complicated, very difficult, po-

tentially quite divisive issues involving both civil and criminal matters where electronic discovery or electronic information was at the basis of the situation.

And the lawyers have done a really good job, frankly, of using this conference in the process to identify the issues and resolve them piece by piece, step by step and move ahead. And if it seems like there was an issue where a mediator could help achieve a resolution, I would have no hesitation making a referral. I come back to the idea that I'm only going to be able to send those parties to mediation so many times and if it was only the discovery issue as opposed to a more global approach to the parties' dispute, I don't know that I would do it.

MR. WEITZ: I want to take us back onto the road we were on before, with the set-up of communications between the mediators and the judge, which of course dovetailed into ethical questions. There's this thing out there called the Uniform Mediation Act.[20] I was wondering if Simeon can tell us what that is. Do we need it, and if so, why; what are the pros and cons?

MR. BAUM: This is a real gift from Dan, I want to thank you. One of the things the State Bar is doing is looking to push the Uniform Mediation Act, which has been sitting up with the legislature for the last couple of years. This Act basically is the statute that creates a privilege. It's not a confidentiality statute. It creates a privilege for mediation communications. It defines mediation as an activity in which the mediator facilitates settlement of a dispute. It's a really useful, and the State Bar thinks, important statute. Right now in New York we don't have clear law except for some limited context like the CDRC's, the Community Dispute Referral Centers. We do not have more broadly a law on the books and records that will clearly protect against the use of mediation communications in court. One hot issue involves the domestic relations context, where there is spousal abuse or child abuse and how to deal with that problem.

The balancing test is: there's no privilege if a court finds after a hearing held in camera that the party seeking discovery

20. UNIFORM MEDIATION ACT, http://www.mediate.com/articles/umafinal styled.cfm.

or the proponent of evidence has shown that the evidence is not otherwise available; that there's a need for the evidence that substantially outweighs the interest in protecting confidentiality; and that the mediation communication is sought or offered in a court proceeding involving a felony, or except as otherwise provided in this section.[21]

So this issue, it's just in the criminal context, but it says that criminal court can say, "Well, we'll waive a need for this mediation communication against the importance of having this information come out in a felony trial." Some would say that there is no criminal court who's going to say, "I care more about confidentiality in mediation than I do about getting information, important information, for this trial." Basically it's going to open the door a lot.

Others have argued, "Oh, we should make it broader, in broader context." At this point I think there seems to be a fairly substantial movement to say, "Listen, whatever it is, this thing was vetted by a host of people through the process for a number of years." It's been adopted, I think, by 11 states. Now, for the Commercial Division, it provides that on mediation reports, a mediator may not make a report, assessment, evaluation, recommendation, finding or other communication regarding mediation to the court that might make a ruling on that dispute.[22]

So it would also provide basically against talking too much with the referring court about the things that happen in mediation or opining about it, which could also be a very useful thing to have clear. We also have a similar rule on that, of course, communications in our Commercial Division rules.

MR. YOUNGER: There's a recent case from the Fourth Department last year which highlights why we need the UMA in New York. And for those of you who are not aware, it's called *Hauzinger*.[23] It was a divorce case where after a mediator successfully got a separation agreement in the course of the divorce agreement the mediator was subpoenaed.

The Appellate Division said, and I quote, "Although appellant urges this Court to apply the confidentiality provisions of

21. *See id.* §5.
22. *See id.* §7.
23. Hauzinger v. Hauzinger, 43 A.D.3d 1289 (N.Y. App. Div., Fourth Dept., 2007).

the Uniform Mediation Act as a matter of public policy, New York has not adopted that Act and we decline to do so."[24] If you're in the Fourth Department and you read that, you're like, "There's no confidentiality in this Department unless you can point to some agreement or something else that you can base your confidentiality on."

Fortunately, the case was then heard by the [New York] Court of Appeals. The Court of Appeals ruled just on waiver. They ruled that the parties had waived any confidentiality. Part of it was that one side waived it by subpoenaing information. They cut back that ruling somewhat.[25] But any of you who are involved in ADR ought to be writing your legislators in Albany to adopt the UMA as soon as possible.

MR. BAUM: This *Hauzinger* case created quite a stir in mediation communities. One unique feature of the UMA is that parties own the privilege. They're able to say you may not communicate, you may not present a mediation communication in court.[26]

The mediator also has a modified ownership of the privilege. The mediator is free even if the parties say, "It's okay to talk about this, mediator," the mediator is free to say, "I'm sorry, I'm not going to, because I, as mediator, am not comfortable telling people at the beginning this is confidential and then afterwards going and talking about what was said in the mediation and, moreover, the mediator has the ownership of the mediator's own communications." So, the mediator can bar other parties, even if everybody else has waived, from introducing the mediator's communications in court under the UMA.

AUDIENCE MEMBER: I've been through this process both as mediator and attorney representing the parties in mediations, and I see mediators who are part of the court's administrative program trying to circumvent this problem totally by requiring in the mediation that the parties sign some type the confidentiality agreement. Doesn't that work to solve the problem?

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24. *Id*. at 1289.

25. Hauzinger v. Hauzinger, 10 N.Y.3d 923 (2008).

26. *See* UNIFORM MEDIATION ACT § 5, http://www.mediate.com/articles/umafinalstyled.cfm.

MR. YOUNGER: It doesn't affect the third party in the mediation room, or say there's a related dispute or someone who's not a party to that agreement.

MR. WEITZ: So, let me use the moderator's prerogative by first thanking the panel for taking time to speak to us today. If you enjoyed being here and were about to come up, let me say this in these following words: 10 years ago all of us up here would probably have said that we were all salespeople, that if we were to do a gathering of the bench and bar, it would be to simply persuade them to try mediation.

But the tipping point is reflected in part by the conversations that we're having and the type of panel that we had today where, in effect, I think we're all becoming neighbors and it's my hope that we will go on from here, and we will all be connectors to create what we might do to connect the communication of the commercial cases.

So thank you very much, everyone, and we hope to see you again.

MR. FEINBERG: First, on electronic discovery; I think what we learned today is that we have to look at the problem creatively, practically and differently, and involve everyone in the process. We can't pigeonhole young lawyers as mere document reviewers, senior lawyers as merely client spokespeople and knowledgeable clients' reps as merely someone whose name you put on an affidavit when you make your court file. For that matter you can't even view judges as the only problem-solver anymore. We all need to help judges solve these e-discovery problems by getting involvement from everybody who can significantly contribute and discuss these issues as early as possible.

To try to summarize everything that's just been considered in this ADR panel would be like trying to summarize all seven Harry Potter books in a two-line Haiku. I'm not even going to try.

What I will say is this: There is more than one way to do excellent ADR work and to do it well. Commercial cases are, simply put, not one size fits all. And the timing of ADR, the portion of the case sent to it, who conducts it and whether or not they are paid and who is involved in the parties are many,

but perhaps not all, of the factors that can set apart one good mediation from a not-so-good one.

And lastly, today's discussion is far from over. This easily could have been a three-day conference or a pair of full semester law school courses; perhaps they should be. I guess I left out one more "thank you," which is to all of you in the audience. You've been great. Thanks, and have a great rest of your day.

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